No. 2688

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RALPH K. BLAIR and THOMAS ADDIS,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

ORAL ARGUMENT OF J. J. DUNNE, ESQ., ON BEHALF OF PLAINTIFFS IN ERROR.

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FRANK D. MONCKTON, Clerk.

By D. Monckton, Clerk. *Deputy Clerk.*

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Foreword.

When this case was orally argued by J. J. Dunne, Esq., on behalf of the plaintiffs in error, on March 27, 1916, the defendant in error had not then prepared, served or filed any brief herein, and requested permission to file such a brief later. That brief was filed on September 27, 1916. At the conclusion of the oral argument, plaintiffs in error requested, and were granted, permission to print and file herein the oral argument of Mr. Dunne, together with such comments in reply to the expected brief of the defendant in error as might appear appropriate. Accordingly, we are making, first, a short reply to the brief of defendant in error, and following that with the oral argument of Mr. Dunne.

Reply of Plaintiffs In Error to Brief of Defendant In Error.

In the discussion of the claim that the facts in the case are sufficient to sustain the verdict the defendant in error, in its brief, narrates those facts of the case thought pertinent (pp. 19-29 inclusive). Following this statement the defendant in error then asserts that "the application of the law to these facts is well expressed by the trial judge * * * as follows:" and then proceeds to quote from the opinion of the trial judge (pp. 29-36). In the course of the quoted opinion of the trial judge occur many statements *as of fact* which we have been at some pains to indicate in our opening brief herein were unwarranted inferences improperly drawn from the agreed statement of facts and not supported by it. It would be unnecessary repetition to restate here what we have so fully covered in our former brief on file herein, but in this connection we desire to call this court's attention to the facts of the case as set forth in the agreed statement of facts and to the facts of the case as they were assumed by the trial judge in the course of his opinion, and we respectfully request of this court that, in reading the brief of the defendant in error, this distinction be borne in mind between the facts of the case as set forth in the agreed statement and as assumed by the trial judge in the course of his opinion. We are prepared to meet the issues presented by the facts narrated in the agreed statement, but the writ of error was sued out herein because we denied the existence of such facts as are assumed by the trial judge in the course of his opinion.

As we have stated our views of the case very elaborately in our brief now on file, and as they have been summarized quite completely by Mr. Dunne in his oral argument which follows later, it will not be necessary to make further reply to the brief of defendant in error.

Before passing to the oral argument of Mr. Dunne, however, we cannot overlook the reference in the government's brief to what is there characterized as "a softly-worded threat that since the verdict has gone against them (plaintiffs in error), they will repudiate their stipulation and insist upon their constitutional right unless this court rules with them and holds that the trial judge indulged in inferences based upon the agreed facts and thereby committed error" (p. 36). This "softly-worded threat" is doubtless a reference to what is said by us on pages 172, 173 and 174 of our opening brief. After referring there to the rule of law to the effect that plaintiffs in error were entitled to a trial by jury, which means a trial by jury according to the course at common law, and that therefore the court could not as a matter of law direct the jury to render a verdict of guilty no matter how sufficiently the court might have thought the facts set forth in the agreed statement established their guilt, and that these rights could not be waived by stipulation, we proceeded further as follows:

> "The plaintiffs in error however are not inclined to avoid the effect of their stipulation. On the contrary, it is their preference to abide thereby *provided the true intent thereof can be preserved* and provided, therefore, this court shall be free to determine as an issue of law, on the writ of error issued in this case, whether the facts set forth in the agreed statement, unaided by inferences, are sufficient to justify a verdict of guilty. If those facts as

so set forth, standing alone are not sufficient to justify a verdict of guilty, but if it will in this court be assumed in support of the verdict of the jury that inferences from those facts could be drawn consistent with guilt and therefore it will be presumed that such inferences were so drawn and will not now be reviewed, the plaintiffs in error would be in a sad predicament and must then, *but in that event only*, insist upon their full legal rights. For under such circumstances they would have been denied all right or opportunity of suggesting to the jury other inferences which could be drawn from the facts set forth in the agreed statement consistent with innocence and calculated, therefore, under proper instructions to the jury as to the doctrine of reasonable doubt and as to the presumption of innocence, to raise in the minds of the jury sufficient doubt, in connection with the presumption of innocence, to incline them to the view that the offense charged had not been established to their satisfaction beyond all reasonable doubt.

But we do not think that it is necessary that this court must conclude that it cannot determine the case upon a consideration of the question whether the facts set forth in the agreed statement, taken by themselves, are sufficient to justify the verdict of guilty. The plaintiffs here requested the trial judge, upon the facts set forth in the agreed statement, to direct a verdict of Not Guilty, and this request was denied (transcript, pp. 129, 160). If the agreed statement of facts was in itself incomplete or insufficient to support a judgment, then under the principles of *U. S. v. Buzzo* (18 Wall. 125) it was error to refuse to direct a verdict of acquittal. To same effect, see also *Vernon v. U. S.*, 146 Fed. 121, 126."

We submit that the foregoing statement of our position does not justify any charge of threatening on our part. We are anxious for the decision of this court, whether the facts set forth in the agreed statement of facts establish the guilt or innocence of the plaintiffs in error. We are of the opinion that in deciding that ques-

tion this court must be guided entirely by the facts as set forth in the agreed statement unaided by inferences, and that proposition we have argued quite fully in our opening brief.

In stipulating as to the facts in this case, it was the intent of the parties to set forth in the agreed statement all the facts of the case: nothing was to be left to inference or conjecture. And this was very clearly the spirit of the stipulation as is manifest by its terms. It was our purpose in referring to the constitutional right of trial by jury, in our opening brief, to insist upon that constitutional right in this case only in the event that in violation of the letter and spirit of the stipulation of the parties it should be claimed that the verdict and judgment of the trial court rested on facts outside the agreed statement and that, no matter how unwarranted the inferences of the trial court might appear to the judges of this court, they were nevertheless bound to accept the same in support of the judgment. In other words we have no intention, and had no intention, of repudiating our stipulation, unless it is repudiated by the other party thereto; and it is repudiated if it be claimed that the decision in this case can rest on any facts other than those set forth in the agreed statement. If this court does not feel bound to accept the inferences of the trial judge in support of the judgment, but on the contrary believes it to be within its power to decide this case upon the facts set forth in the agreed statement, the constitutional right to a trial by jury referred to in our opening brief is a right which we do not insist upon, no matter how the court may determine the case.

ORAL ARGUMENT OF J. J. DUNNE, ESQ.

Mr. DUNNE. *If the Court please:*

The Indictment:

On July 8, 1915, an indictment was returned by the federal grand jury, at San Francisco, against the Blair-Murdock Co., a corporation, R. K. Blair, Thomas Addis, H. G. Lane, Kenneth Croft and C. D. Lawrence. This indictment was in two counts, the one charging the defendants with conspiring to hire and retain, within the United States, certain named men to go beyond the United States for the purpose and with the intent to enlist in the British military service as soldiers, and the other charging a similar conspiracy but substituting the phrase "marines and seamen aboard a vessel or vessels of war" for the term "soldiers"; but since the plaintiffs in error were acquitted of the charge made in this second count, that count need not concern us further. The intent referred to in this indictment is not alleged to have been a common intent known to, understood by and participated in by the persons mentioned; the farthest that the pleading goes in that direction is to allege the independent or individual intent of the defendants, upon the one side, and the equally independent or individual intent of the named men, upon the other side; and no claim is made in this pleading, by any apt allegation, that the minds of these parties ever met upon any proposition, or that these insulated intents were ever intercommunicated, or ever coalesced into any homogeneous, consistent or unified purpose shared by all concerned.

The asserted conspiracy is alleged to have originated on March 15, 1915, and to have been *"continuously in existence and process of execution"* thereafter. No overt act is charged against the Blair-Murdock Company or C. D. Lawrence; as against R. K. Blair, it is alleged as overt acts that he received moneys from A. C. Ross and deposited them in bank, that he purchased certain railway tickets, and that he paid certain money to a railway company; as against Kenneth Croft, it is alleged that he sent two telegrams to Blair from Chicago; as against Thomas Addis, it is alleged that he made a physical examination of four persons; and as against H. G. Lane, it is alleged that at San Francisco he engaged lodgings for 20 men, three of whom are named.

It is, however, to be observed that these allegations of overt acts wholly fail to link the alleged overt acts themselves with the asserted conspiracy by any connecting ligament of fact; thus, it is nowhere alleged what Blair did with the moneys received from Ross, or where he obtained the money with which he purchased the railway tickets, or what he purchased them for, or what he did with them after the purchase, or where he obtained the money that he paid the railway company, or what he paid that money for; nor is it anywhere alleged what, beyond naked physical receipt, Blair said or did as to the Croft telegrams, or that he ever replied to, acted upon, or ratified them in any way; nor is it anywhere alleged what the Addis examination of the four persons had to do with the asserted conspiracy; nor is it anywhere alleged by what authority Lane presumed to act for either Blair or Addis.

What this indictment attempted to charge, then, was not that the defendants below combined to assist home physically fit British subjects who were wholly unobligated to enter the British military or naval service, but it sought to charge that the defendants were actually guilty of a corrupt and felonious conspiracy to violate the law of the United States by actually hiring and retaining persons here to go to Great Britain *for the specific purpose of entering the military or naval service of that Kingdom.* This indictment was unsuccessfully attacked in the court below, and complaint is made here of the failure of the lower court to condemn the pleading.

The Agreed Statement of Facts:

While these proceedings were taking place, the British Embassy and the Department of Justice became anxious to take the opinion of the court upon this case; and in view of this, counsel "stipulated as to what *the facts are in this case",* and that, upon a consideration of *those facts,* the court may instruct the verdict which the jury shall render in the cause.

It is the view of the Supreme Court that:

> "Agreed statements rest upon the consent of the parties, and consequently the action of the revising tribunal must be confined to the agreed facts."
>
> *Pomeroy's Lessee v. Bank of Indiana,* 68 U. S. (1 Wall.) 592.

While we have agreed to the facts recited in the agreed statement of facts, yet we have agreed to nothing more; and in view of this declaration by the Supreme Court, we believe that this agreed statement of facts

should not be enlarged by any argumentative process, however ingenious or subtle, that no new matter can fairly be injected into the statement, and that, if this were permitted, we should no longer have a given state of facts voluntarily brought to the court by the parties, but an entirely different case, and one not approved by that mutual consent upon which the Supreme Court tells us agreed statements rest.

At the trial below, this agreed statement of facts, with its exhibits, was read to the jury; and *upon that showing,* the Government rested; but no other, different or additional showing of fact was made. Thereupon, the defendants moved for a directed verdict, which motion was granted as to all the defendants upon the Second Count—the marines and seamen count, and granted as to all the defendants except Blair and Addis upon the First Count—the soldiers count. In other words, the indictment as presented accused five persons and one corporation; it asserted that they all conspired and confederated together; but this assertion was not verified, and on the hearing all of the defendants except Messrs. Blair and Addis were eliminated. As the verdict shows, Messrs. Blair and Addis were found guilty upon the First Count only, and by this verdict the marines and seamen count passed out of the case.

Attitude of Appellate Court:

It will thus be seen that the present case was not treated below as an ordinary criminal cause; the procedure below was unusual and a departure from the ordinary course of things; the case was and is really a

test case designed to clarify a phase of the law of neutrality; and in the effort to reach this desired result, both sides co-operated so far as possible.

Another characteristic of the cause as presented below is that no witnesses were sworn, or any other showing of fact made except that contained in the agreed statement of facts and its exhibits. The case, therefore, was not one wherein questions of fact were dependent upon conflicting evidence for their solution, or where the trial judge had an opportunity to see the witnesses and appraise their appearance, manner and credibility; and the ordinary rules which obtain in cases of this class are inapplicable here. On the contrary, the instant cause falls within that class of cases wherein, either there is no conflict concerning the facts, or the testimony is taken without the presence of the judge, as by deposition or before a master; and in this latter class of cases, this court is in no way embarrassed by the rules applicable in the former class, in putting upon the showing of fact whatever construction the court may deem proper.

In a word, the cause at bar was heard and determined below upon the set lines of a carefully drawn written instrument, and upon nothing else; this court is, therefore, quite as competent to appraise the sufficiency or insufficiency of that document to uphold this judgment, as was the learned judge of the court below; and the distinction to which I am here directing attention was recognized by this court in

Paauhau S. P. Co. v. Palapala, 127 Fed. 920, 923-4.

Limited Scope of Oral Argument:

Upon this writ, we have prepared a brief in which we have endeavored to present fully our views of the various questions presented by this record. We have discussed the legislative and political history of English and American neutrality legislation; we have sought to give attention to the construction of that legislation; we have attempted to ascertain, not merely that which is, but also that which is not, a violation of it; we have discussed the bases of the law of conspiracy as related to section 37 of the Criminal Code; we have analyzed the nature of the charge in the indictment, and criticized the action of the lower court in declining to condemn that indictment; we have developed the point that this agreed statement of facts is subject to the rule announced by the Supreme Court that

> "agreed statements rest upon the consent of the parties, and consequently the action of the revising tribunal must be confined to the agreed facts";

we then analyze the agreed statement of facts for the purpose of showing that it fails to exhibit any corrupt and felonious conspiracy between Messrs. Blair and Addis to violate section 10, or any hiring or retaining of men by them for foreign enlistment, or any attempt or effort to do so; we then take up the subject-matter of intent, and discuss it from the three-fold point of view of general criminal intent, specific intent and contingent intent; and finally, the various assignments of error are individually considered.

From this hurried enumeration, it must, I submit, be obvious that, during the permitted time, one cannot dis-

cuss this case at large; the attempt to do so would be inadequate and unsatisfactory; but while I devote my time to a single feature of the case, yet I would respectfully request that it should not be understood that, because I so limit myself, I therefore consider untouched matters to be of secondary importance.

Conspiracy Under Federal Law:

The accusation made against these plaintiffs in error was that they conspired to commit an offense against the United States. But here it is proper to observe that every charge of crime against the United States must have a clear legislative basis; and therefore, since there is no such thing as a common law offense against the United States, the federal courts can take cognizance of such conspiracies only as are made punishable by federal statute.

By section 37 of the Criminal Code, it is in general terms made a punishable offense for persons to conspire to commit an offense against the United States; but the object of such conspiracy must be to commit an offense against the United States in the sense only that it must be to do some act made an offense by the laws of the United States. Resort must, therefore, necessarily be had to other provisions of the laws of the United States than section 37; because, from the very nature of the offense alleged, it is apparent that the law of conspiracy, as invoked in this cause, is dependent upon other provisions of the laws of the United States for its application, as in itself it affords no definite standard by which the legality of objects, means or conduct may be adjudged.

In other words, under section 37, these plaintiffs in error were accused of conspiring to commit an offense against the United States; but to understand that offense and what it may be, we must go elsewhere—we must resort to section 10. Under these two sections, then, the question arises whether this agreed statement of facts shows, by facts which displace the presumption of innocence beyond all reasonable doubt, that these plaintiffs in error criminally conspired to violate section 10, *that there was a real agreement and concert between them to commit the particular offense denounced by section 10,* that such agreement and concert were inspired by the specific criminal intent required, and that these elements were followed up by overt acts designed to further the object of the antecedent conspiracy.

Corrupt Criminal Concert Necessary:

In cases of this class, a corrupt criminal agreement is the basis of the accusation of conspiracy; there must be a real agreement as distinguished from independent, individual purposes which have never coalesced into any agreement or concert; and that agreement must be one that is corrupt and criminal under the statutes of the United States. In federal criminal jurisprudence, there is no such legal concept as conspiracy in the abstract; parties may conspire—to use the term loosely—as much as they please, and yet remain immune from prosecution, so long as, for example, no overt act is done; and it is just because under federal law, the thought of conspiracy is essentially relative and concrete, that the mere conspiring is not criminal under section 37.

Under section 37, a voluntary combination of men has in it no element of evil which infects with criminality or indictability acts which are in themselves not criminal or indictable under other specific statutory provisions; on the contrary, voluntary combination is indictable or not just as the conduct which it involves is statutorily indictable or not. In other words, men may voluntarily combine without being guilty of conspiracy, as when they combine themselves into corporate or non-corporate associations of all kinds; the combination becomes criminal only when the conduct which it involves is criminal; it is the criminal nature of the concerted purpose which imparts to the combination its criminal character; this is why Judge Sanborn, speaking for the Circuit Court of Appeals for the 8th Circuit, tells us that it is neither criminal nor unlawful to do, or to conspire to do, that which the law does not prohibit; this is why resort is had in this cause to section 10; this is why, in the cause at bar, the alleged criminal and concerted purpose is claimed to have been the hiring and retaining of these men for enlistment in a foreign military service.

Combination to do Unprohibited Acts, not Criminal Conspiracy:

If these views be correct, it inevitably follows, I submit, that, assuming for argumentative purposes the existence of a combination between these plaintiffs in error, still, if their acts and conduct, as disclosed in this agreed statement of facts, cannot fairly be said, beyond all reasonable doubt, to have been acts and conduct infected with criminality,—if it cannot be said

that such acts and conduct were the acts and conduct prohibited by section 10,—it must then be plain that no criminal conspiracy to violate that section is disclosed, and that this judgment cannot stand. If this agreed statement of facts fails to establish, by actual facts which overcome the presumption of innocence beyond all reasonable doubt, that these plaintiffs in error, criminally conspired to *hire and retain* these men *for enlistment as British soldiers,* and that they were inspired therein by an evil and illegal intent to violate section 10, and that they performed acts designed, not for some innocent purpose, not for some purpose not prohibited by law, but for the specific purpose of furthering the object of that antecedent criminal conspiracy, then this prosecution must fail. In other words, still assuming a combination, this contention might thus be put into syllogistic form: it is not a criminal conspiracy to combine to do that which federal statutes do not prohibit; but this agreed statement of facts fails to establish that these plaintiffs in error did any act or thing prohibited by any federal statute, or, in particular, by section 10; therefore, the assumed combination was not a criminal conspiracy.

How, indeed, is it possible that a combination to do unprohibited acts should be a criminal conspiracy? If the acts and conduct recited as having been done by these plaintiffs in error did not actually involve a real combination for the specific purpose, and with the specific intent, to *hire and retain* men here *for foreign enlistment as British soldiers,*—if those acts and that conduct are explained by another hypothesis, reasonable in itself

and consistent with innocence, fairly arising upon the agreed facts,—how can it be said that the disclosures of this agreed statement of facts call for the sustaining of this judgment?

General Characteristics of Agreed Statement of Facts:

In this agreed statement of facts, we have a given state of facts voluntarily brought to the court by the parties, and approved by their mutual consent; it was the sole showing of fact in this criminal action; it contains no clause permitting the introduction of new or additional matter by any process; it declares specifically that the facts therein set forth are *the facts in the cause*, and that, upon consideration of *those facts*, the court may instruct the verdict; it commences with the significant heading, "Facts"; it makes clear that all that plaintiffs in error did was that they "*did the acts and things now herein set forth as done by them*"; and it contains no statement that any other fact or facts ever existed save and except those specifically agreed to be the facts.

This agreed statement of facts shows upon its face that it was deliberately and carefully drawn; it was no hurried or spasmodic act; the language was carefully chosen to mean just precisely what it expressed—no more, no less; the facts recited are the very facts agreed to and on which the minds of the parties met; no other fact or facts became the subject of any agreement between the parties; and all of the facts must be taken to be contained in this statement, and the cause dealt with upon that footing. The circumstance that the

parties did not agree to any other facts than those set forth, is highly significant; if they had intended that any other or additional facts than those agreed on might be, by any process, imported into the statement, it would have been very easy for them to have said so in plain terms; no reason suggests itself as to why they should not have unequivocally said so; and if such were their intention, words would have been inserted in the appropriate place to accomplish that result.

If, in the face of this agreed statement, we are to slip the leash from imagination, and indulge in those "surmises, speculations and conjectures not countenanced in criminal law" (*People v. Porter,* 104 Cal. 415, 417), what is it that we are to import into the case? Where are we to stop? What limit can be put upon a procedure so subversive of the deliberate agreement of the parties? And if, forgetful of the admonition of the Supreme Court that

> "agreed statements rest upon the consent of the parties, and consequently the action of the revising tribunal must be confined to the agreed facts"
>
> *Pomeroy's Lessee v. Bank of Indiana,* 68 U. S. (1 Wall.) 592.

If, forgetting this admonition, we are to have new or additional facts superimposed upon this agreed statement, why should they not, responsively to all rules and analogies current in criminal causes, be facts which operate in favor of innocence rather than in favor of guilt, especially in an unusual test case like this, wherein this court is equally competent with the lower court to

interpret the solitary written record upon which the cause was presented?

There is, indeed, no antecedent presumption that a crime has been committed, or that the person accused has committed it. The law puts the burden of proof upon *the accuser,* and requires *him* to establish the truth of the accusation beyond all reasonable doubt; and consequently, evidence which leaves it uncertain whether the crime charged was committed, or whether the accused committed it, is insufficient for any judicial purpose. Hence it is that where the facts of a case are consistent with varying theories, a judicial tribunal will adopt that which makes for innocence; and hence, also, the anxiety of these plaintiffs in error to preserve inviolate the integrity of this agreed statement of facts.

Its Contents:

The contents of the agreed statement of facts may be rapidly summarized. Following the numerical order of the paragraphs, it appears that since August 1, 1914, a state of war existed between Great Britain and Germany; that the British King was desirous of the return of British subjects, for the double purpose of military employment and of employment in the various branches of the national service of all kinds; that there is no compulsory military service in Great Britain; and that the men named in the indictment were not British reserves. While, so far, there is of course no showing of any conspiracy to hire or retain men as British soldiers, yet we see already a motive for the return of fit British subjects quite apart from military service;

and we see that fit men were needed for other employments than in the army and navy,—although men of military experience would naturally be preferred during times of war, even in a country in which military service could not be compelled.

After telling us that Mr. Ross was the British Consul-General, we are advised that, on August 3, 1914, he published a notice to the Naval Reserves, which the newspapers commented on, and to which many persons responded, though only six were reserves; but what all this had to do with the plaintiffs in error we are not advised, it not appearing that they were in any way connected therewith, or participated therein, or knew anything thereof, or even came into contact with Ross until some seven months later. Between August 3, 1914, and March 5, 1915, nothing occurred except that Ross kept at the consulate a list of names and addresses of persons who called "to inquire concerning military service"—whatever that may mean; but it nowhere appears that, during this period, Ross, Blair, Addis and Harris were even acquainted—much less that any acts of any one of them were known to or participated in by any of the others.

On March 15, 1915, some 7½ months after the publication of the notice to the Naval Reserves, Ross procured the services of Blair, Addis and Harris; nothing appears to show the purpose or the nature of these services; and while it is stated that Blair, Addis and Harris did the acts and things set forth, yet it does not appear that those acts and things were done because

of any criminal combination or agreement to do them. On March 18, 1915, Blair, Addis and Harris rented a room in Pine Street, under the name of the British Friendly Association, which was, on May 27, 1915, changed to Fremont Street; until this removal Harris was in charge; after the removal Blair was in charge; and it nowhere appears that at any time Addis had any charge of this office. Like thousands of other associations, the British Friendly Association had printed letter-heads which, to the knowledge of Blair and Addis, were used by Harris in the correspondence and business transactions of the British Friendly Association; but no details of that correspondence or those business transactions are given so that their actual nature may be determined. The British Friendly Association was unincorporated, formed with Ross's consent, and composed of Blair, Addis and Harris; its expenses were paid by the British Government through Ross; and it had no other business, and was organized for no other purpose, than to *facilitate the transportation to New York* of British subjects, sound in body and limb. Thus far, then, we observe no criminal conspiracy actuated by the specific intent to violate section 10 by *hiring or retaining* men for *the foreign enlistment alleged,* and we do see facts consistent with the lawful facilitation of the transportation of men to New York.

When the British Friendly Association office was opened, the list of names already mentioned was, to the knowledge of Blair and Addis, temporarily entrusted to Harris, who, on May 27, 1915, gave it to Blair, who

returned it later to Ross, who voluntarily offered it for the purpose of this agreed statement of facts. When this list was entrusted to Harris, it was accompanied by the following instructions:

1. To send only British subjects who had military training.

2. To make no engagements of any description whatever.

3. To give no pay or advance.

4. To make no solicitation.

5. Not to send more than 50 men at a time.

6. To require such proof of British nationality as such men are usually able to give.

7. They were to give no information as to pay, allotments, etc.

8. The men were to be examined to see if they were physically suitable.

And we submit that, in the absence of evidence to the contrary, so convincing as to remove all reasonable doubt, it would be unreasonable to contend that these instructions were framed and issued for the specific purpose of violating section 10, or that they were prompted by any other motive than obedience to the law. No fact can be found in the agreed statement of facts to indicate in the remotest way any evil purpose or corrupt intention in the framing and issuance of these instructions; nor is there a wisp of fact, however, attenuated, to establish that any of these instructions were disobeyed or departed from.

Harris, to the knowledge of Blair and Addis, opened correspondence with persons whose names appeared in the list; but what that correspondence dealt with is nowhere disclosed; the agreed statement of facts is silent upon the subject; and nowhere is a single fact stated to show that this correspondence dealt with the *hiring or retaining* of any man *for enlistment in the British service.* When "inquiring individuals" called at the consulate, they were referred to Mr. Blair; but what they were "inquiring" about is nowhere agreed to; and they might, with equal facility and reasonableness, have been inquiring for assistance home to Great Britain as for an agreement of hire as British soldiers. It also appears that certain blank receipts and cards were printed, neither of which contained the slightest reference to military matters; but the receipts were for sustenance money, which would be equally as necessary in the cases of men assisted home as in those of men hired or retained to enlist as British soldiers; and the cards were equally inconclusive, because they were filled out for, but not by, the men, and were filled out by the same persons who were instructed, not only to send only British subjects who had military training, but also to make no engagements of any description whatever, give no pay or advance or information, and solicit nobody; and naturally, in obeying their instructions, as they did, military training was looked for, and in line with the instructions a memorandum thereof was equally naturally made. But to see in this any violation of section 37 or section 10—any corrupt criminal conspiracy to *hire and retain* these men *for foreign*

enlistment as British soldiers,—argues a power of vision of which I must confess myself deprived.

It next appears that at various dates, and with moneys furnished by the British Government, Blair purchased some 91 railway tickets, which were used to transport British subjects who had done military or naval service, and had been examined by Addis; some of the tickets transported the men named in the indictment; and 155 in all were transported. But surely, no just finding of a criminally corrupt conspiracy to violate section 10 can be based upon a desire, during the stress of impending war, to prefer men who had done military or naval service and were sound in body and limb; the King was desirous of the return of his subjects for a double purpose—for employment in the army and navy, and for employment in the various branches of the national service of all kinds; and experienced men who were physically sound would be quite as welcome in the latter employment as in the former. All of these facts, however, like the others, are entirely consistent with the assisting home of such men unobligated to enlist; indeed, from the beginning to the end of this history, as revealed in the agreed statement of facts, notwithstanding the claims of the indictment, notwithstanding the months of time, notwithstanding the plentitude of opportunity and the lack of obstruction, notwithstanding the alleged purpose and energy of this asserted conspiracy, yet, in not one solitary instance, was even an abortive attempt made to hire or retain any man for foreign enlistment as a British soldier;

if anything of that sort had ever occurred, it would overleap all bounds to one's credulity to suppose that such fact would not be conspicuously emblazoned in this agreed statement of facts, with the name of the man hired, the date and terms of the hiring, the character of the service to be rendered and its duration, and the remuneration to be paid. But no such violation of the consular instructions ever occurred; we challenge our opponents to lay a finger upon any paragraph of the agreed statement of facts which contradicts this statement; and, *inter alia,* we urge, in refutation of this accusation, that we did not do the thing that it is asserted we conspired to do, and that our conduct was quite consistent with a perfectly innocent motive.

If the plaintiffs in error had combined to assist home such of their fellow-countrymen as would not be a burden upon a country engaged in a great conflict, surely one of the most natural forms which such assistance would take would be the providing of sustenance, lodging and transportation; and the agreed statement of facts shows that this assistance was furnished. But no section of the Federal Criminal Code makes it a crime for a British subject to return home, if he desire to do so; no section makes it criminal to give him all the assistance incidental to such return, if he require it; no section makes it criminal for British subjects to combine to assist home their fellow-countrymen, if the latter desire to return and require assistance. Such conduct is not prohibited by law; and, as Judge Sanborn puts it, it is not criminal to do, or to conspire to do, that which the law does not prohibit. What the law does prohibit is written in

section 37 and section 10; there must be a corrupt criminal conspiracy to commit against the United States the specific offense of *hiring and retaining* men here *for foreign enlistment* as British soldiers; but no such conspiracy is established by facts that carry us no farther than to the disclosure of the legitimate assistance home of men unobligated to enlist. No peculiar significance can, therefore, it is submitted, be attached to the provision made for sustenance money or for board and lodging, or for the details of the transportation to New York; such facts are all plainly quite in line with, and would necessarily be dictated by, and incidental to, the policy of assisting home British subjects, and by no means establish the verity of the accusation made in this indictment.

In paragraph 38, the agreed statement of facts refers to an "unknown person" who undertook to instruct applicants as to the necessary requirements for transportation. Neither the identity nor the authority of this unknown is anywhere fixed; and since the plaintiffs in error are in no way connected with this personage, and wholly repudiate him or her, this may be passed by. The agreed statement of facts then takes up the occurrences which took place after the men had departed from California en route to New York. It appears that, at Chicago, they were interviewed by United States agents, and Croft telegraphed Blair; but the federal agents were content to pass the party on its way; Croft's telegrams convey no hint as to any hiring or retaining, and are quite such telegrams as might have been sent were the men being assisted home, free to en-

list or not, as they pleased; and Blair never replied to the Croft telegrams, or acted upon them, or in any way confirmed or ratified them. The party arrived in New York on June 22, 1915; and on the next day, "some of this party"—which may very well mean two or three out of twenty-five,—"appeared before a man called Captain Roche at the British consulate", and were again examined; and those who passed received an empty envelope to be exchanged at the dock for a steamship ticket to Liverpool. But as to the identity or authority of the man called Captain Roche, or as to why these proceedings occurred, or as to any relation between them and the prohibited foreign enlistment, or as to any antagonism between them and the unprohibited assisting home of these men, we are not told a word; it nowhere appears that any of these occurrences took place because of any direction by, or agreement with, the plaintiffs in error at San Francisco or elsewhere; this agreed statement of facts is silent as to any relation or privity between these plaintiffs in error and any occurrence without the State of California.

Paragraph 44 states the well-known fact that British soldiers and sailors get paid; but even this fact was imperfectly known, because the rate of pay was unknown, and also whether it had been increased. Paragraphs 46, 47 and 48 are devoted to the personalities and shortcomings of Cook, Stables and Johnson; and it appears that all of the parties except Cook were British subjects, and that the plaintiffs in error were not British reserves. It is then stated that the funds were advanced by the check of Ross payable to Blair or the Blair-

Murdock Company, and that Blair deposited the funds in the Bank of California in his own name or in that of the Blair-Murdock Company, and checked accordingly; but nothing is stated to qualify the openness of these proceedings, or to show that they were surrounded by any sort of secrecy or mystery. It is then stated that no other proof of military or naval service of the men named in the indictment was required or produced except that which appears on the cards; that the continental countries of Europe, through their consular and diplomatic officers, assist the free return of their subjects for military service as required by their compulsory laws—an obvious discrimination against Great Britain which has no compulsory military service; and that nothing in the agreed statement of facts shall qualify the right to remove this cause by writ of error to an appellate court.

This agreed statement of facts deals, then, with three distinct periods. The first is that period which extends from the outbreak of the war, on August 1, 1914, to March 15, 1915, the date alleged in the indictment as the date of the formation of the alleged conspiracy (pars. 1-9); the second extends from March 15, 1915, to June 16, 1915, when the men left for New York (pars. 10-39); and the third extends from June 16, 1915, to July 8, 1915, when the indictment was filed (pars. 40-56). During the first and third of these periods, no privity or relationship between the occurrences recited and the plaintiffs in error is anywhere established; and during the second of these periods we see the plaintiffs in error doing the things which they would naturally

have done if their purpose was to assist British subjects home, and abstaining from doing the things which they would normally have done if their purpose had been to recruit soldiers for the British army. Thus, we see the office, the British Friendly Association and its object, the physical examinations, the sustenance money, the railway tickets, the departure of the men; but we see no departure from the consulate instructions, or any inducing or solicitation of men for this foreign enlistment, or any agreement between plaintiffs in error or with any man to recruit soldiers, or any engagement of a single recruit during three unobstructed months, or any meeting of minds, or any speech, with any man as to any foreign enlistment,—all that we see is consistent with the lawful purpose of assisting home British subjects, who were free to act as they pleased upon arrival.

So far as the facts go, can it fairly be said that they establish, to the exclusion of all reasonable doubt, a corrupt criminal conspiracy to violate section 10, in contradistinction to a combination to do what the law does not prohibit, namely, the assisting home of fit British subjects unobligated to enlist? If we assume a combination between these plaintiffs in error, then the nature of that combination can only be determined from the acts which, in the agreed statement of facts, it is actually agreed that these person really did; and in this regard, we submit that, eliminating the fine frenzy of an unrestrained imagination, and adhering strictly to the record before us, the utmost that could reasonably be urged, upon the agreed facts, is that the plain-

tiffs in error combined to assist home physically fit British subjects, but that they never conspired to hire or retain, nor did they in point of fact ever hire or retain, any person or persons here to go abroad to enlist in the military service of the British King in violation of section 10. No other conspiracy than this is charged against them; no pretense is made that they, with studied elaboration, entered into any formal conspiracy; no conscious criminal purpose inspired their conduct, and this the learned judge of the court below conceded when he remarked that "it may be true that they believed they were acting within the law" (record, 151). The sole source of information as to their conduct or purpose is this agreed statement of facts; and that document, we earnestly submit, fails to sustain the accusation in this indictment.

If this accusation of criminal conspiracy to violate section 10 were well founded, is it not extraordinary that, in no single instance, was there any agreement, understanding, contract or obligation of any sort, upon which the minds of the parties are shown to have met, whereby any one man was engaged to enlist as a soldier in the British service? Upon the theory of this prosecution, the hiring and retaining of men for this foreign enlistment was the object to which the alleged conspirators were directing their energies, and which they were endeavoring to accomplish; but is the existence of an alleged criminal conspiracy established beyond all reasonable doubt by a state of proof wherein it wholly fails to appear that the accused parties did, or attempted to do, that which it is asserted they were so anxious to do?

In this cause, these plaintiffs in error had an abundance of time—three months, at least—within which to hire and retain men for this foreign enlistment, if this alleged conspiracy existed, and there was not a solitary obstacle to prevent plaintiffs in error from doing that which *ex hypothesi,* they were so ardent to accomplish; but not only does the agreed statement of facts wholly fail to disclose any promise upon the part of a single individual to enlist upon arrival in Great Britain, not only does it wholly fail to disclose the faintest trace of solicitation by these plaintiffs in error of any man or men for foreign enlistment, but it affirmatively shows that no speech was had upon this subject of foreign enlistment between any of these plaintiffs in error and any of the men transported to New York. Upon the theory that these men were being assisted home without any obligation to enlist, the facts are quite intelligible; but upon the opposite theory, the conduct of the parties is inexplicable. As we shall see shortly, there can be no hiring or retaining without a meeting of minds; as pointed out in the *Kazinski* case, there must be a "distinct" hiring and retaining,—"an engaging of one party by the other with the consent and understanding of both"; but what paragraph of this agreed statement of facts shows that these requirements were satisfied? To go no further, when and where did the minds of any of the parties meet as to the date when the alleged service was to begin, or as to its duration, or as to the character of the service, or as to the remuneration, or as to any other term of any agreement of hire? These

features, so necessary to any agreement of hire, would be wholly unnecessary if these men were being assisted home without being hired to enlist; and their absence cannot be said to strengthen the claim of the prosecution.

But again: who that reads the consular instructions without antecedent anxiety to discover something making for guilt, can fairly say that obedience to them would compass the violation of section 37 or section 10? And what paragraph of the agreed statement of facts exhibits any disobedience of any of these instructions? What American citizen was knowingly sent? Not Cook, because he wilfully falsified and deliberately deceived, both in San Francisco and in Chicago; not Stables, because *he was a British subject,* who wilfully concealed his American enlistment; not Johnson, because *he was a British subject,* and former deserter from the British navy; and all the rest are conceded to be British subjects. With what man was any engagement made? Who received any pay or advance? Who solicited men? What man was solicited? To what man was any information given as to pay or allotments? The remaining instructions were not of a criminal character, because, since there is no criminality in assisting home British subjects who desire to return, no criminality can be extracted from instructions which regulate the number sent at one time, or require some verification of the claim of British nationality, or prevent the return of physical inefficients to a country taxed by the burden of a mighty conflict.

Paragraphs 45 and 55:

It will have been observed that, in the foregoing summary of the agreed statement of facts, I have made no reference to paragraphs 45 and 55. Making specific reference now to those paragraphs, it may be said of them that they represent the ultimate limit to which the Government's case developed; and it is therefore material to ascertain what that limit was, and whether it included a wilful, corrupt and felonious conspiracy to hire and retain men for enlistment as British soldiers. From these two paragraphs the following affirmative and negative facts appear:

1. The plaintiffs in error supposed, believed and presumed that the men would enlist.

2. It was the individual intent of a majority of the men to enlist.

3. It nowhere appears what this "majority" was,—whether one more than half, or one less than all.

4. It nowhere appears that this "individual" intent of this "majority" was ever communicated to these plaintiffs in error.

5. It was never expressly said in words by plaintiffs in error to any of the men that they should enlist.

Bearing these matters in mind, the question recurs as to what is a hiring or retaining; and whether an agreement of hiring or retaining can arise out of a supposition, belief or presumption, or be based upon an uncommunicated intent of an uncertain majority, or exist where no speech was had upon the subject between the person hired and the person hiring. But

in the Hertz case, it was laid down that where there is an engagement on the one side to go beyond the United States with the intent to enlist, and an engagement on the other side that when the act shall have been done a consideration shall be paid, the hiring and retaining may be regarded as complete; but this rule plainly contemplates something more than supposition, belief and presumption on the one side, an uncommunicated intent upon the other side, and an absence of speech upon both sides,—it contemplates a meeting of the minds of the parties upon the terms of a distinct engagement. In this *Hertz* case it is also said that

> "it is the hiring of the person to go beyond the United States, that person having the intention to enlist when he arrives out, and that intention known to the party hiring him, and that intention being a portion of the consideration before he hires him, that define the offense";

and here, again, we recognize the ingredients of distinct agreement, intent of the party hired, knowledge of that intent by the party hiring, and the intent of the party hired forming part of the consideration before the hirer hires him. And so, also, in the *Kazinski* case, it was directly held that "a distinct hiring or retaining by the defendants must be shown"; and a hiring and retaining was there defined to be "an engaging of one party by the other with the consent and understanding of both".

It follows, I submit, from these judicial utterances, that the hiring and retaining condemned by section 10 must embrace the following ingredients of a transaction performed within the United States, namely, parties,

common intent, consent, understanding, agreement, consideration, and definite subject-matter. These elements are surely not supplied by the uncommunicated intent of paragraph 45. While that paragraph states that it was the individual intent of a majority to enlist yet it does not pretend to state that any one of these men was hired to enlist, whether in pursuance to any antecedent conspiracy or otherwise; and the only intent which this paragraph attributes to these men is one which is "individual",—a significant term which repels all thought of a community of intent, or meeting of minds. An individual intent would seem to be one which is peculiar to the individual; it is opposed to a collective, common or mutual intent; it is opposed to associated or common interests; and if we are to give to the term that "ordinary signification" which was favored by the learned judge of the court below, it is an intent which is purely personal, isolated, and unshared by others. But it is not among these agreed facts that the plaintiffs in error had any knowledge of this individualistic intent, or that this intent formed any part of any agreement for foreign enlistment; on the contrary, the agreed facts show that the mental attitude of the plaintiffs in error never developed beyond the conjecturality of supposition, belief and presumption, and that no speech was ever exchanged between them and these men upon the subject-matter of foreign enlistment.

In the *Kazinski* case, it is said that a distinct hiring and retaining must be shown, and that a hiring and retaining is an engaging of one party by the other

with the consent and understanding of both; but this ingredient of consent to an engagement for foreign enlistment, is not the uncommunicated "individual" intent of paragraph 45. If we are still to employ the "ordinary signification" of words approved by the learned judge of the court below, such consent must mean the expressed and communicated assent of a man delivered to the person engaging him; it involves affirmative mutual action, not mere supine passivity; and it involves an "understanding" by both parties of the character and elements of the engagement. We therefore insist that the phrase "hire and retain", as explained in the decisions, carries with it the thought of the distinct engaging by one party of the other with the consent and understanding of both; the transaction must be an active one by both; each party must be an active factor in its accomplishment; mere individual undisclosed intent is not enough, because, indeed, if for no other reason, that might well exist and yet, for one reason or another, the "consent" be withheld; and there must be that common consent to, and mutual understanding of, the terms of the engagement, without which we cannot conceive of any meeting of minds.

It may not improperly be said that all agreements which create an obligation by way of consent, are bilateral, and that the term engagement involves the idea of binding together two or more persons by the *vinculum juris* of a promise. There must, therefore, have been a common, communicated intention to accomplish a hiring and retaining; but there must have been something more than this intention; the intention must

itself ripen into a promise. An intention is a mere emotion or operation of the mind—a purpose to effect a certain result; but a promise is an agreement or engagement to carry a purpose into effect which gives to the person to whom it is made a right to demand the performance of the particular purpose. The term "promise" is not synonymous with "expectation", or "hope", or "supposition, belief and presumption"; but it means, if it mean anything, "agreement", "obligation", "undertaking", "engagement". Indeed, the whole matter is thus summarized in a New Jersey case:

> "The expression of an intention to do a thing is not a promise to do it. An intention is but the purpose a man forms in his own mind; a promise is an express undertaking to carry the purpose into effect. The intention may begin and end with the person who forms it. A promise supported by a good consideration can only be rescinded by the act of both the parties to it—for to make a binding promise, there must be a promisee as well as a promisor."
>
> *Stewart v. Reckless,* 24 N. J. L. 427, 430;
> *Holt v. Akarman,* 86 Atl. (N. J.) 408.

From this it follows that an individual intention to do a thing, *even though expressed,* does not amount to a promise; still less can an engagement of hiring and retaining be predicated upon an unexpressed or uncommunicated intention; the parties must not only have entertained a distinct common intent, but that intention must ripen into such a promise as, to apply the views of the *Kazinski* case, is known to, understood by, and participated in by both of the parties to the engagement.

This view is emphasized by the definition of the learned judge of the court below. He, a firm believer

in giving to language its ordinary signification, thus formulates his views:

> "To hire, in its ordinary signification, and we should here seek no other, means 'to contract for the labor and services of, for a compensation, to engage the services of, employ for wages, salary or other consideration, to engage the interest of, agree to pay for the desired action or conduct of', and this has been the meaning of the word since it was first used in the statute in question and its predecessors."
>
> (Trans. p. 145.)

But could any definition more acutely accent the thought, not only of an actual meeting of minds, but also of an actual meeting of minds upon definite elements ripening into a distinct promise? What more significant than the recurrence of such assimilated terms as "contract", "engage", "employ" and "agree"? What more pointed than the repeated reference to "labor and services", "interests" and "desired action or conduct"? What more suggestive than the inclusion of "compensation", "wages, salary or other consideration", and "pay"? Are these ingredients established, beyond all reasonable doubt, by suppositions, beliefs, presumptions or uncommunicated "individual intents", in a case in which absence of speech upon the subject between the parties interested stands confessed? Bearing in mind the language of Mr. Justice Gray that "a contract is made when, *and not before,* it has been executed by both parties, so as to become binding upon both". (*Holder v. Aultman etc. Co.*, 169 U. S. 81, 89), how can it be reasonably contended that supposition, belief, presumption or any other uncertain or subjunctive

mood is compatible with that distinct agreement required by the *Kazinski* case?

It has been judicially declared that "supposition has no legitimate sphere or habitation in judicial administration", and that the burden of proof cannot be sustained upon suppositions (*Johnson v. State,* 16 So. (Ala.) 99. 105; *Miller Brent Lumber Co. v. Douglas,* 52 id. 414, 415); the distinction between belief and knowledge is so clear that it would be pedantic to cite authorities; and a thing presumed is a thing conjectural. Before this judgment can stand, this agreed statement of facts must establish the actual commission of the offense charged, to the exclusion of every other reasonable hypothesis fairly arsing upon the agreed facts; as observed in the *Porter* case, an indulgence in surmises, speculations and conjectures is not countenanced in criminal law (104 Cal. 417); and this note of actuality everywhere pervades the criminal law. No person is to be supposed, believed or presumed into criminality; the law does not make criminals of people upon the potential, possible or theoretical; and a criminal prosecution is no place for uncertainties, doubts or debilitated constructions, whether of law or of fact.

When an accusation of crime is made, it cannot be constructively imputed to the accused that he is guilty; guilt can be established only by evidence so convincing that the strong presumption of innocence is effectually displaced beyond all reasonable doubt; such proof is limited to the establishment of that which existed at the time charged as an actual fact, in contradistinction

from that which is merely theoretical or potential, or merely supposed, believed or presumed; the dominant consideration is that of the actual reality of the alleged crime, as opposed to a constructive crime built up upon supposition, belief, presumption, imputation, speculation or conjecture. But nowhere throughout this agreed statement of facts is it anywhere stated, not so much that the plaintiffs in error did engage any man to enlist, but that they actually knew that any man would enlist; and this, although the Supreme Court, through Justice Field, tells us of the wide difference between belief and knowledge (*Iron Silver Mg. Co. v. Reynolds,* 124 U. S. 374). Nowhere throughout this agreed statement of facts is it anywhere stated that any promise of any sort was given by anybody; and if there had been any promise, it would have been accorded a prominent position in the agreed statement, and its terms would have been set forth; but no attempt was made to enter into any prohibited engagement; the consular instructions were recognized and obeyed; and no hiring or retaining can be based upon the absence of all agreement to that effect, definite or indefinite,—the absence of a fact has not yet been judicially declared to establish its presence.

And what, indeed, is there in this agreed statement of facts to establish that the supposition, belief and presumption of these plaintiffs in error controlled in any way the men referred to? What is there to show that these men knew of that supposition, belief and presumption, or that, if they did know of it, they considered themselves obligated to act in conformity therewith?

Will it be pretended that the *ex parte,* uncommunicated supposition, belief and presumption of these plaintiffs in error actually took away from these men the right to make a disposition of themselves or their services different from that contemplated by this unilateral supposition, belief and presumption? What is there here which deprives these men of their right to bestow themselves precisely as *they* pleased? Paragraph 45 tells us that all of these men did not intend to enlist, but that the "majority" only so intended; and yet, with characteristic obscurity, it fails to advise us whether that majority was one more than half or one less than all. But, taking the view which favors innocence rather than guilt, out of 25 men transported, 13 intended to enlist, but 12 did not; and yet, if there be any fact agreed upon which operated to deprive the men of their freedom of action, if this *ex parte* supposition, belief and presumption were by some mysterious process to strip these men of the right freely to dispose of themselves and their services in the manner that best pleased themselves; if out of all that is related in this agreed statement of facts some supposed, believed and presumed promise to enlist is to be conjectured, why were not these 12 men affected similarly to the others? And if it be claimed that, as to the 13 men, there was a promise because they intended to enlist, then, not only is an intention not a promise, but such promise would still be dependent upon the intent out of which it is assumed to arise; and yet there would be nothing compulsory about such intent; no man would have been under any obligation to entertain it, as the position of

these 12 men demonstrates; the men were free so to intend or not, as they pleased; and there was no agreement of hire to restrict their liberty. No claim can be made that the 12 men who did not intend to enlist were not to be transported; no claim can be made that they were not in fact transported; but why was this so, if an alleged conspiracy existed with an asserted purpose which called for a hiring to enlist as a pre-requisite to transportation? How is the transportation of the 12 men who had no intention to enlist, a transportation in all respects precisely like that of the 13 men who intended to enlist, to be explained consistently with the accusation of this indictment?

In the *Hertz* case, an analogue for the hiring of a recruit is found by the learned judge in the hiring of a servant; but what, I may ask, would be the judicial fate of one who sued as a hirer to recover damages for an alleged breach of an alleged hiring, committed by the person claimed to have been hired, and who, when called upon to establish the alleged hiring, was compelled to admit that no words upon that subject ever passed between the parties, and that he only supposed, believed and presumed that there was such a hiring? In a civil cause, such a litigant would incontinently vanish; and yet it is in a criminal cause that the attempt is actually made to fasten guilt upon these plaintiffs in error upon an equally impotent theory.

Intent:

And here let me add a word upon the subject of intent,—a branch of the case which was ignored by the

learned judge of the court below. It would be idle to attempt to support by authority the necessity for criminal intent; to employ Mr. Justice Field's expression, it is "essential to the commission of a public offense"; and it is, indeed, generally recognized as the subjective element in crime. In the next place, we urge that a conspiracy to violate a statute involves an intent to violate that statute; and that unless such intent existed in the minds of the alleged conspirators, there can be no offense. Such intent must be contemporaneous with the act, because, as Mr. Justice Field remarks:

> "The criminal intent essential to the commission of a public offense must exist when the act complained of is done; it cannot be imputed to a party from a subsequent independent transaction."
>
> *U. S. v. Fox,* 95 U. S. 670.

Before this judgment can stand, it must therefore be manifest from this agreed statement of facts, beyond all reasonable doubt, that there existed in the minds of the accused persons a corrupt and felonious purpose to violate section 10. The formation of a common design by two or more persons, or the participation in a common plan by them, is never of itself a criminal conspiracy, because this may be, and usually is, entirely innocent. Before such a confederation can be regarded as criminal, it must have been entered into with a criminal intent; and this requirement is recognized in the indictment in this cause, which alleges that the defendants did the acts charged "wickedly, corruptly and feloniously". This material element can never be decided as matter of law, but always as matter of fact;

and in cases where it is absent or in doubt, acquittal must follow, because uncertainty is no basis for a criminal conviction. But the learned judge of the court below took no account of this vital phase of the case; and of this, complaint was made below, and is repeated here. We think that the learned judge erred in considering the bare acts of the defendants to the exclusion of their purpose and intention in doing those acts.

But moreover, the accusation here is that the plaintiffs in error were animated by the criminal intent to violate section 37 by conspiring with the specific intent to violate section 10; and here we meet that specific intent so frequently referred to in the books. Some acts are crimes without reference to the purpose which they were intended to accomplish; other acts become criminal only when performed with some particular design. In the latter class of cases this special design enters into the nature of the act itself, and is usually called the specific intent; and such specific intent, as part of the alleged offense, must be alleged and proved to the same degree of certainty as any other part of the offense alleged. This specific intent must be established as an independent element in the case, because, as pointed out by the Supreme Court of California,

> "When a specific intent is an element of the offense, no presumption of law can ever arise that will decide this question of intent."
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> *People v. Landman,* 103 Cal. 577, 580;
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> *People v. Johnson,* 106 id. 289, 295.

In dealing with general criminal intent as distinguished from specific intent, it is often said, in a

general way, that intent is to be gathered from the facts, and this aphorism is sought to be applied to the element of specific intent; but, in a case of similar impression to this, it is the specific intent to violate section 10 with which we are dealing, and that intent must be gathered, if at all, from facts showing a purpose specifically to violate that section, but not from facts showing a purpose to assist home British subjects who desired to return.

If these plaintiffs in error did the acts and things recited in the agreed statement of facts, not with the intention to violate either section 37 or section 10, but because they believed, with the courts, that it was not a criminal act to depart the United States to enlist in foreign military service, or to transport persons leaving for that purpose, or because they believed it no crime to assist their fellow-countrymen to do what they had a perfect right to do, namely, to return to Great Britain, then neither the general criminal intent nor the specific intent, essential under this indictment, would have been proved. Unless the purpose of these plaintiffs in error in doing the acts and things recited in the agreed statement of facts was evil—unless they were inspired by the criminal intent to violate section 37 by conspiring, with the specific intent, to violate section 10, this judgment should not be supported; but no consideration was given by the learned judge of the court below to this feature of the case, notwithstanding complaint made by plaintiff in error; and we venture to think that the learned judge fell into prejudicial error when he failed to consider, not merely the bare acts

themselves, but also the intention and purpose with which they were done. It cannot be doubted, we believe, that such intention and purpose were ingredients of the offense charged, and were, therefore, highly material to the issue of guilt or innocence then depending before the court and jury.

These plaintiffs in error have always repudiated any intent to violate either section 37 or section 10; they believe that their purpose to assist home any fit man who wished voluntarily to return, and to do this without engaging him to enlist, is quite manifest from this agreed statement of facts; they obeyed the consular instructions, and no claim to the contrary can be justified; they solicited no man; they made no engagements of any description; they exacted no promise to enlist from any man as a condition precedent to the giving of assistance; they told no man to enlist, and many of the men assisted never intended to enlist; and they were, for these and other reasons, entitled to have the learned judge of the court below give due consideration to their claim that they were quite as innocent of criminal intent as of criminal act. And they were the more entitled to have this phase of the case carefully considered, because their acts and conduct, so far from having a criminal character, are readily explainable upon a rational and natural hypothesis which arises fairly upon the face of the agreed statement of facts, and which is entirely consistent with innocence, namely, that although there was a state of war between Great Britain and Germany, still, while the British King was desirous of the return to Great Britain of British subjects for

employment in the army and navy, yet he was also desirous of the return to Great Britain of British subjects for employment in the various branches of the national service of all kinds. No claim can fairly be made that the sending fit men home for employment in any one of the various branches of the national service, is offensive to any section of the Federal Criminal Code. No more comprehensive terms could have been employed to include every conceivable kind of labor, whether of the hand or brain; every kind of industry and every employment, whether manual or intellectual, in the service of the nation, is embraced within the language used; and as if to emphasize and make more explicit the intention that the words "national service" should not be taken in any restricted sense, they are followed by the significant words, "of all kinds". And it may be added that since reference had already been made to employment in the army and navy, it must be obvious that other employments, distinct from employment in the army and navy, are contemplated by employment "in the various branches of the national service of all kinds", the language plainly discriminates between the two forms of activity—between military service and other forms of service; and if military service were included within the phrase "the various branches of the national service of all kinds", there would clearly have been no necessity whatever for the tautological expression, "employment in the army and navy".

Here, then, were two distinct motives to explain the acts and conduct of the plaintiffs in error,—the one criminal, let us assume, but the other obviously innocent; and since the acts and conduct of the plaintiffs in error were quite as consistent with the innocent motive as with the assumed criminal one, that, we submit, under the settled rule, should end this cause in their favor. These plaintiffs in error insist that their conduct was throughout actuated by innocent motives only; the learned judge of the lower court was constrained to concede that "it may be true that they believed they were acting within the law"; while they merely "supposed, believed and presumed", but did not know, and were neither told nor promised, that the men would enlist, yet no word passed from them to the men upon the subject of enlistment, no engagement was entered into by them with any man, and in point of fact many of the men never intended to enlist. There *was* a need for fit men in "the various branches of the national service of all kinds", and the King *was* desirous of the return of British subjects to take up such employments; and the plaintiffs in error were, therefore, entitled to appeal to that very need to strengthen their claim that, in assisting British subjects to return home, their purpose was not to violate either section 37 or section 10,—was not to hire or retain men for army and navy purposes as distinguished from national service purposes.

The foregoing is presented in behalf of both plaintiffs in error, Addis not caring to make any separate reply.

Dated, San Francisco,
October 2, 1916.

Respectfully submitted,

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